IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0522

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROLAND DEE TIREY,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Katherine R. Curtis, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT.)

Appellant Roland D. Tirey respectfully replies.

In responding, the State focused on Tirey's need to accept responsibility for a failure to act as expected. (Appellee's Br. at 20: "primary concern was Tirey's failure to accept responsibility.")

This focus is incongruent with the State's minimization of APO Fairbank's failures. APO Fairbank failed to visit, investigate, and approve Tirey's proposed residence, thereby leaving him homeless during the winter. APO Fairbank did so with full knowledge Tirey was precluded from staying in homeless shelters, was living in a truck in frigid temperatures, and was faithfully calling her twice a day to apprise her of his location. (Appellant's Br. at 3-4; 3/19/09 Tr. (Tr.) at 33, 43; 5/12/09 Tr. at 36-39, 49-50.)

The State does not deny that APO Fairbank chose to leave Tirey homeless, that APO Fairbank knew he was unable to stay in homeless shelters, or that he provided APO Fairbank with a map to his proposed residence on Upper Woodchuck Road. The only fact unknown to the State is for *how long* a time period APO Fairbank knowingly left Tirey homeless. (Appellee's Br. at 20.)

The State's concession requires, at a minimum, reversal and remand to provide the court the opportunity to consider the issue based upon a full and accurate record.

I. THE STATE HAS EFFECTIVELY CONCEDED TIREY'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT ELEVATED HIS TIER LEVEL.

The State conceded the court erred by elevating Tirey's tier level designation from Level I to Level II. (Appellee's Br. at 40.)

The Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution protect a defendant from a court's reliance on "materially false or unreliable information at sentencing." *Bauer v. State*, 1999 MT 185, ¶ 20, 295 Mont. 306, 983 P.2d 955, *citing United States v. Powell*, 487 F.2d 325, 328 (4th Cir. 1973); *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986). The State has conceded the district court erred by imposing an elevated tier level designation on Tirey. (Appellee's Br. at 40.)

The reversible error conceded by the State (unlawful increase in Tirey's tier level) is grounded in the materially false and unreliable information provided by APO Fairbank, an executive branch employee acting as an agent of the court while she supervised Tirey. *Brunsvold v. State*, 250 Mont. 500, 505, 820 P.2d 732, 735 (1991) (APO "act[ing] in direct obedience to, and discharge of, the court's sentencing order" is acting as an agent of the court).

APO Fairbank had three and one-half years of experience as an APO. She considered herself a "sex offender specialist," based upon her "additional 80 hours in sex offender specific supervision techniques." (Tr. at 6-7.) Within a few

months of her first meeting with Tirey, APO Fairbank was no longer supervising sex offenders, allegedly due to her treatment of them. (Tr. at 26.) Ms. Clodfelter was "quite upset" that APO Fairbank arrested Tirey in her office on his first day of aftercare. (Tr. at 24.) Sometime between Tirey's March 19, 2009 revocation hearing and his May 12, 2009 dispositional hearing, APO Fairbank was relieved of her supervisory authority over sex offender probationers.

Tirey's Level I designation was imposed on April 15, 2008, years after his 2004 parole violations. It is a lawful designation imposed by MSOTA-qualified therapist Blair Hopkins on behalf of the DOC, who has access to all of Tirey's history. Mont. Code Ann. § 46-23-509(5).

APO Fairbank, however, disagreed with Dr. Hopkins and the DOC and believed Tirey should be designated a Level II (moderate risk) or Level III (high risk). (5/12/2009 Tr. at 34.) APO Fairbank recommended an increased tier level even though there were no allegations that Tirey had engaged in any inappropriate, prohibited sexual conduct since his November 2008 release. APO Fairbank's recommendation conflicted with Tirey's lawful tier designation. (Appellee's Br. at 40.) APO Fairbank's testimony of the risk Tirey posed was based in part on the homelessness she imposed on him. (Tr. at 11.) APO Fairbank failed to inform the court that Tirey's continuing homelessness was not due to any willful conduct on

his part, but was due to her failure to visit and either approve or disprove his proposed residence. *State v. Lee*, 2001 MT 176, ¶ 21, 306 Mont. 173, 31 P.3d 998.

The court erroneously relied on APO Fairbank's testimony and recommendation when it elevated Tirey's designation to Tier II. The State has conceded the court erred. (Appellee's Br. at 40.)

Although there was no allegation of any inappropriate sexual conduct on Tirey's part, and he had attended Ms. Clodfelter's treatment on December 3, 2009, APO Fairbank testified Tirey was "a menace." (5/12/2009 Tr. at 32.) APO Fairbank erroneously testified and misinformed the court that Tirey's Level I designation was no longer valid because it was imposed prior to his 2004 parole revocation. (5/12/2009 Tr. at 34.) APO Fairbank's testimony was materially false. Just months before his release to Missoula, Tirey was lawfully designated a Level I offender. (Appellant's Br. at Ex. B, citing Mont. Code Ann. § 46-23-502.)

A. The State's Preponderance of the Evidence Argument Fails On the Basis of APO Fairbank's Erroneous Testimony.

The court's error in elevating Tirey's tier level is due to APO Fairbank's failure to accurately inform the court of Tirey's Tier I designation. The State's reliance on having met its preponderance of evidence burden is fatally flawed by APO Fairbank's failures to inform the court of the written agreement requiring Tirey to "enroll" in aftercare within two weeks and her neglect of her duty to visit Tirey's proposed residence, thereby knowingly leaving him homeless. These

failures on APO Fairbank's part were critical to and tainted the court's decisions to revoke Tirey's suspended sentence and to determine whether incarceration was required to protect the community.

In revoking Tirey's suspended sentence, the court dismissed APO Fairbank's concerns that he had not yet secured employment or that he did not have twenty employment-related contacts per day. (5/12/2009 Tr. at 70.)

The court was:

> significantly concerned about Mr. Tirey's failure to get into treatment, even more concerned by Mr. Tirey's failure to accept responsibility for that and failure to offer any credible – at least as the court analyzes, any credible excuse for -- for not doing so.

(5/12/09 Tr. at 70, emphasis added.)

The State contends it showed, by a preponderance of the evidence, that Tirey failed to meet with Ms. Clodfelter "despite the constant admonitions of his probation officer to do so." (Appellee's Br. at 11-12, 14.) The State's argument fails on the plain language of the APO Fairbank's written directive to Tirey: "enroll" within two weeks. (Appellee's Br. at 15, *citing* Appellant's Br. at Ex. F.) Had APO Fairbank fully informed the court by providing Exhibit F, the court's view of Tirey's credibility would likely have been different. The APO's comments regarding her oral directives to attend within two weeks that are cited by the State are contradicted by the plain language of Exhibit F. (Appellee's Br. at 15.)

Tirey does not argue, as the State claims, that Exhibit F required nothing of him beyond enrolling in treatment. (Appellee's Br. at 12.) Tirey's own conduct belies this contention--he attended his first confirmed aftercare session on December 3, 2009, where he was promptly arrested by APO Fairbank. (Appellant's Br. at 6-7; Tr. at 16, 24.)

1. APO Fairbank Failed to Conduct the Required Home Check on Tirey's Proposed Residence.

This Court should not ignore the clear testimony that APO Fairbank, while acting as an agent of the court, failed to perform the required home check. (5/12/09 Tr. at 37-39.) The State did not respond to Tirey's argument under *Walker* and Mont. Code Ann. § 46-23-1011(3), that the APO's failure to perform the required home check created an unnecessary and inhumane impediment to his successful adjustment to probation. (Appellant's Br. at 15-16, citing *Walker v. State*, 2003 MT 134, ¶ 80, 316 Mont. 103, 68 P.3d 872 (citation omitted); Appellee's Br. at 18-20.)

The State weakly asserts "it appears" Tirey did not request a check of his proposed residence until the day before his arrest and thus it could not have contributed to his revocation. (Appellee's Br. at 20, *citing* Appellant's App. D.) The testimony of APO Fairbank and Tirey undercut this argument.

APO Fairbank did not testify that she did not know of Tirey's proposed residence until the day before she arrested him. Incredibly, in another display of

APO Fairbank's penchant for ignoring her duty, she testified she "told" Tirey he could stay there.

> Q. (Defense Counsel) And um, as I understand it this was where he - - he wanted to stay, correct? It - - it's a - - it's a (inaudible).
>
> A. (APO Fairbank) It was a residence where he - - yes.
>
> Q. Did you go out and check that residence out?
>
> A. Um, at that point in time, I couldn't, I didn't have four-wheel drive.
>
> Q. So Mr. Tirey is - - is homeless and there was no way to check out where he could live?
>
> A. He was told that he could stay there because I was familiar with the area from being up there previously. I hadn't been up there prior to him going up there.
>
> Q. And he actually has to though have approval to actually move in there, correct? And live there?
>
> A. Yes.

(5/12/09 Tr. at 37-38.)

Tirey's testimony also precludes the State's argument that his proposed residence only became known to APO Fairbank the day before she arrested him. His testimony provides insight into the justified wariness of an APO's abuse of the the court's delegated power to supervise probationers. While APO Fairbank may have told Tirey he could stay in his proposed residence without the mandated home check, he knew he could not trust her oral permission.

> You don't need a four-wheel drive to go up there and see where I wanted to live 'cause I don't have a four-wheel drive and I drive up there every day that I could. I wasn't staying out there, I wouldn't stay out there cause she hadn't been out to approve it and I wasn't gonna (sic) get violated over that.

(5/12/09 Tr. at 54, emphasis added.)

2. APO Fairbank Failed to Provide the Court With Appellant's Exhibit F.

The State seeks to excuse the APO's failure to fully inform the court of this written directive to "enroll" by claiming it was not part of the record below. (Appellee's Br. at 15.) The State's cursory dismissal of Exhibit F, and its attendant implications for its burden of proof argument, are perplexing. APO Fairbank acted as an agent of the court while supervising Tirey. *Brunsvold*, 250 Mont. at 505, 820 P.2d at 735. The court relied upon APO Fairbank's testimony in revoking Tirey's suspended sentence. Any omission of Exhibit F from the record below is due to APO Fairbank's failure to provide it to the court.

Restated, the State has argued that it is up to a probationer to catch an APO in a material misrepresentation or omission in fulfilling her duties to the court. Such a distorted view of the duty of an agent to the district court should not be condoned by this Court.

B. Remand Is the Appropriate Remedy.

There is no need to infer that APO Fairbank's testimony tainted the proceedings and infected the court's finding the State met its burden of proof.

APO Fairbank's erroneous testimony reveals the taint. APO Fairbank testified Tirey is "a menance" when he is lawfully a Level I, low risk to reoffend. APO Fairbank failed to provide Exhibit F to the court. APO Fairbank failed to inform the court she knowingly left Tirey homeless and living in a truck through her failure to conduct the required home check.

APO Fairbank's erroneous testimony and material omissions tainted the court's finding the State had made its preponderance of evidence burden, requiring remand.

II. REGARDLESS OF THE ATTORNEY GENERAL'S PERSISTANT ARGUMENTS TO THE CONTRARY, WELL-REASONED JURISPRUDENCE SHOULD NOT BE OVERRULED.

A. Tirey's Ex Post Facto Claim Has Not Been Waived.

This Court reviews any sentence imposed based on an allegation the sentence is illegal or exceeds statutory mandates, "even if no objection is made at the time of sentencing." *State v. Brister*, 2002 MT 13, ¶ 16, 308 Mont. 154, 41 P.3d 314; *citing State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000.

Additionally, the State's partial citation to the record does not constitute a waiver. (Appellee's Br. at 27.) Reading further, it is clear there was ongoing confusion regarding the court's intention to impose new conditions.

> MR. CORRIGAN: Judge, I may have misunderstood, but I had thought you were not incorporating these recommended conditions in the ROV as part of his sentence.

THE COURT: Oh, no, I am.

MR. CORRIGAN: You are?

THE COURT: Yes.

MR. CORRIGAN: I did misunderstand.

THE COURT: I'm sorry.

MR. CORRIGAN: Gotcha.

THE COURT: I don't know what I said to make you think that.

MR. CORRIGAN: I thought you said you were just gonna (sic) leave the conditions the way they are.

(5/12/09 Tr. at 76-77.)

Based upon the documented confusion that even the State experienced regarding the revocation court's imposition of new conditions, the Court should reject the State's waiver claim and reach the ex post facto issue.

B. The Ban on Ex Post Facto Laws Prohibit a "Lack of Governmental Restraint" in the Enactment of Arbitrary, Potentially Vindictive Legislation.

The State's argument is circular, but persistent. (*See* Appellee's Br. at 32 ("the State has frequently argued" the imposition of additional conditions to a suspended sentence is not an ex post facto violation so long as the new conditions are not punitive and do not increase the punishment of the original sentence).) The State has persisted in spite of this Court's jurisprudence to the contrary.

The State's responsive argument omits the dual purpose for "banning ex post facto legislation: (1) to give fair warning to individuals of what conduct is punishable, and (2) to restrain federal and state governments from enacting arbitrary and potentially vindictive legislation." *State v. Leistiko*, 256 Mont. 32, 36, 844 P.2d 97, 100 (1992), *citing Calder v. Bull*, 3 U.S. 269 (1798). "Critical to relief under the ex post facto clause is the lack of fair notice and governmental restraint when a legislature increases punishment beyond what was prescribed when the crime was committed." *Leistiko*, 256 Mont. at 36, 844 P.2d at 100, *citing Weaver v. Graham*, 450 U.S. 28 (1981).

The ex post facto test was addressed again in *State v. Mount*, 2003 MT 275, ¶ 24, 317 Mont. 481, 78 P.3d 829 (three prongs: (1) punishes as a crime an act not unlawful when committed; (2) makes punishment for a crime more burdensome; or (3) deprives person charged with a crime of any defense available under law at time it was committed.).

As applied to Tirey, the application of Mont. Code Ann. § 46-18-203 (2003) and (2007) are a prohibited because they make the punishment for his crime "more burdensome." *Mount*, ¶ 24. For clarity, the conflicting laws, as applied to Tirey, will be addressed.

C. The Numerous Penalty Statutes as Applied to Tirey.

1. The Confusion Abounds as the State Attempts to Apply Numerous Revocation Statutes to Tirey, Rather Than the Applicable 1995 Statute.

Prior to the 2003 enactment of Mont. Code Ann. § 46-18-203(9), Tirey was entitled to be sentenced upon revocation under the 1995 sentencing statute. *State v. Rudolph*, 2005 MT 41, ¶ 16, 326 Mont. 132, 107 P.3d 496; *Brister*, ¶ 26.

Tirey had notice of the 1995 revocation statute at the time of his offense. A court has three options upon revocation: (a) continue the suspended sentence without a change in conditions; (b) continue the suspended sentence with modified or additional terms or conditions, or (c) revoke the suspension of a sentence and require the defendant to serve either the sentence imposed or any lesser sentence. Mont. Code Ann. § 46-18-203(7) (1995). Thus, the 1995 statute provides a court with the authority to add to or modify Tirey's probation conditions only if the suspended sentence is continued. Mont. Code Ann. § 46-18-203(7)(a)-(c) (1995).

The "lesser sentence" language cited by the State refers to a term of imprisonment. (Appellee's Br. at 37-38.) The 1995 sentencing statute does not preclude a revocation court from returning a probationer to prison, as argued by the State. (Appellee's Br. at 38.) A suspended sentence "is a discretionary act of grace by a district court." *State v. Haagenson*, 2010 MT 95, ¶ 16, 356 Mont. 177, 232 P.3d 367. Upon revocation, the 1995 statute authorizes the court to choose

among alternatives, one of which allows the addition or modification of conditions. The 1995 statute prohibits the more burdensome punishment imposed on Tirey: return him to prison and add conditions.

The State's argument that all of the additional conditions that were imposed upon Tirey could have been imposed at his original sentencing is a red herring. (Appellee's Br. at 25-26.) It presumes the application of Mont. Code Ann. § 46-18-203(7) (2003) is not prohibited ex post facto legislation, an argument Tirey does not concede. It ignores the obvious--even if the new conditions could have been imposed during original sentencing, they were not.

Under the controlling 1995 statute, the court could impose new or modified conditions only if the suspended sentence was continued. Mont. Code Ann. § 46-18-203 (1995). *See State v. Nelson*, 1998 MT 227, ¶ 20, 291 Mont. 15, 966 P.2d 133 (plain language of § 46-18-203(7)(b) (1995), requires court to find defendant violated terms and conditions of suspended sentence as predicate to exercise of its authority to continue suspended sentence with modified or additional terms and conditions.).

The State's contorted view of *State v. Frazier*, 2001 MT 210, 306 Mont. 358, 34 P.3d 96 and *State v. Gordon*, 1999 MT 169, 295 Mont. 183, 983 P.2d 377 should be rejected. (Appellee's Br. at 35-37.) The "real" holding of these cases does not adjust the parameters of the original sentence to the length of

imprisonment and suspension only. These cases, read in conjunction with the 1995 statute, establish that the court exceeded its authority when it returned Tirey to prison *and* added and modified his conditions of probation. Mont. Code Ann. § 46-18-203(7) (1995).

The State distinguishes *Rudolph*, *Brister*, *State v. Azure*, 179 Mont. 281, 282, 587 P.2d 1297, 1298 (1978) and *State v. Tracy*, 2005 MT 128, 327 Mont. 220, 113 P.3d 297 on the grounds there was no consideration of legislative intent as to retroactivity. (Appellee's Br. at 31.) Since the Department of Justice was unhappy with this Court's jurisprudence in *Brister*, it turned to the legislature in 2003.

2. The DOJ Conceded the 2003 Amendment May "Raise Legal Problems."

Montana Code Annotated § 46-18-203(9) (2003) was enacted in response to this Court's ruling in *Brister*, on the grounds of "alleviating the burden of applying old, outmoded laws." (Appellee's Br. at 24-25, *citing* Mont. H. Judiciary Comm., *Hearing on H.B. 170, 58th Leg., Reg. Sess.,* Ex. 3 (Jan. 20, 2003). The amendment was proposed and supported by the Department of Justice (DOJ).

Mr. John Connor testified on behalf of the DOJ. When asked about the "legal or constitutional problems" inherent in adding terms that were not included in the original sentence, Mr. Connor responded: "that would raise legal problems" that may be cured if the new conditions are related to the original offense. H. Judiciary Comm., *Hearing on H.B. 170* at 14.

This Court should reject the DOJ's continuing attempts to overrule well-settled jurisprudence, particularly under the guise it would alleviate a non-existent burden of applying the laws under which an individual was sentenced. Significantly, *Brister* was based on Mont. Code Ann. § 46-18-203 (1983) which allowed a revocation court just two alternatives: "either revoke the suspended sentence and order the defendant to serve the remainder of his prison term, or continue the suspended sentence under the original terms." *Brister*, ¶ 27. The legislature had already cured the "*Brister* problem" at the time it enacted the 2003 amendment because Mont. Code Ann. § 46-18-203 (1995) provided a revocation court with the third alternative.

Beyond the "legal problems" admitted to by the DOJ, the 2003 amendment creates more burdensome sentences for probationers (in the form of new, additional conditions) and a significantly increased burden on the courts due to litigation over the parameters of what is "related to the original offense."

3. Indignation in 2007 Over Bill O'Reilly's Claim on Cable Television That Montana Law Enforcement Is "Yellow and Cowardly."

Montana Code Annotated § 46-18-203 (2007) was part of a comprehensive package of legislation known as Montana's "Jessica's Law." Amendments allowed revocation of a sex offender's suspended sentence for violation of any condition of supervision. Mont. Code Ann. § 46-18-203(1) and (6)(a)(ii)(2007).

The DOJ participated in these amendments, and then Attorney General Mike McGrath was personally thanked by its sponsor. Mont. Sen. Comm. on Judiciary, *Hearing on S.B. 547, 60th Leg., Reg. Sess.,* Audio 02:18:48-02:19:37 (Feb. 22, 2007). The bill was modeled after Florida legislation passed in wake of a horrific crime. Young Jessica was kidnapped from her own bed, assaulted, and murdered by an unsupervised, violent sexual predator who had been released into the community without notification. Jessica's father channeled his grief into legislation to prevent another such occurrence.

Mr. Bill O'Reilly, host of a cable television show, "The Factor," made it his mission to see Jessica's Law passed in all states. His mission began during a year the Montana Legislature was not in session. Using his cable show, Mr. O'Reilly called out states that had not passed Jessica's Law, including Montana. Introducing SB 547 to the Senate and House hearing committees, Senator Perry described his indignation. He was infuriated by Mr. O'Reilly's broadcast that Montanans were "yellow" and "cowardly" and did not care about children. Senator Perry was eager to settle the score with Mr. O'Reilly by ensuring his bill passed. *See* Mont. Sen. Judiciary Comm., *Hrg. on S.B. 547, 60th Leg., Reg. Sess*., Audio 02:13:38- 02:18:48, (Feb. 22, 2007); Mont. H. Judiciary Comm., *Hrg. on S.B. 547, 60th Leg., Reg. Sess*., Audio 39:17-43:20 (March 28, 2007).

Jessica's Law of Montana was primarily intended to ensure the State's ongoing supervision of Tier 3, violent sexual predators with a high risk to reoffend. By the time it was heard in the Senate and House committees, it was a vehicle to assuage fury and indignation over Mr. O'Reilly's public comments and attacks on Montana law enforcement.

Mr. Mike Mahoney, MSP warden, was more rational and tempered in his comments. He considered the legislation to have two critical pieces; it was a resounding message to violent predators, combined with balance for training and treatment for those who can benefit. *Sen. Hrg. on S.B. 547*, Audio 02:31:17-02:32:28; *H. Hrg. on S.B. 547*, Audio 1:08:23-1:09:09.

As a Level I offender, the law intended a balanced approach to providing training and treatment options for Tirey. It did not.

D. As Applied to Tirey, His Punishment Is "More Burdensome."

As applied to Tirey, § 46-18-203(2003) and (2007) violate the dual purpose of the prohibition against ex post facto laws. The 2003 amendment was proposed and enacted at the behest of the DOJ to solve a nonexistent *Brister* problem, as the 1983 statute at issue had already been amended and did not apply to Tirey. Amendments in 2007 targeted Tier 3 sex offenders, and were proposed and enacted in indignation to being "called out" by Mr. Bill O'Reilly.

Tirey submits this type of national name calling should not be the driving force behind Montana's laws, sentencing policy, or sentencing decisions. To justify the more burdensome sentence imposed on Tirey, the State has relied upon laws lacking governmental restraint; that are arbitrary, potentially vindictive legislation; and that violate the bank on ex post facto legislation. *Leistiko*, 256 Mont. at 36, 844 P.2d at 100, *citing Calder*.

Tirey is entitled to be sentenced under the 1995 statute. The State urges this Court overturn well-reasoned decisions in favor of the DOJ's persistent efforts to undermine them. The State seeks to argue over what constitutes increased punishment, an argument that has already been rejected. *State v. White*, 2008 MT 464, ¶ 23, 348 Mont 196, 199 P.3d 274. This Court observed: "It is self-evident" that if a sentence is imposed subject to Conditions A, B, and C and then altered to be subject to Conditions A, B, C, D, and E, it is not either the sentence imposed or a lesser sentence. *White*, ¶ 23. The logical corollary is that additional conditions create a more burdensome sentence.

This common sense approach is legally sound and tracks with recent discussion in *Haagenson*. An offender under a suspended sentence "lives with the knowledge that a fixed sentence for a definite terms hangs over him." *Haagenson*, ¶ 16 (citation omitted). "Revocation leaves the offender subject to the execution of the original sentence as though he had never been given conditional release or

suspension of a sentence." *Haagenson*, ¶ 16. The State's argument here conflicts with *Haagenson*. The addition and modification of Tirey's conditions does not allow him to know that a fixed sentence for a definite term hangs over him. It does not return him to a position in which he had never been given a suspended sentence subject to fixed conditions.

The State's reliance on *State v. Griffin*, 2007 MT 289, 339 Mont. 465, 172 P.3d 1223 is misplaced. *Griffin* involved a Level III offender who contended it was punitive to require him to successfully complete an Intensive Supervision Program (ISP). *Griffin*, ¶ 12. ISP is not at issue here. Notably, Griffin agreed to ISP to avoid incarceration. *Griffin*, ¶ 25. Tirey, a Level I offender, was returned to MSP with additional, modified conditions imposed.

This Court should reject the State's arguments. The new, modified conditions were imposed on Tirey via prohibited ex post facto laws enacted to solve a phantom *Brister* problem and to retaliate against a television personality's public taunts. These amendments are barred as applied to Tirey, a Level I offender, who did not receive the benefit of remaining in the community while being subjected to additional and modified conditions. *See* Testimony of MSP Warden Mike Mahoney, *Sen. Hrg. on S.B. 547*, Audio 02:31:17-02:32:28; *H. Hrg. on S.B. 547*, Audio 1:08:23-1:09:09

III. TIREY ACCEPTS THE STATE'S CONCESSION THAT HE IS A LOW RISK TO REOFFEND.

Tirey accepts the State's concession that he is a Level I, low risk to reoffend. This designation was imposed on April 15, 2008 (four years after his parole violation) by MSOTA provider Blair Hopkins in accord with Mont. Code Ann. § 46-23-509(2) and (5). (Appellant's Br. at Ex. B.) To ensure Tirey is not prejudiced by this error, now or in the future, the Level 2 designation must be expunged with a directive that it may not be used in any manner.

By citing to § 46-23-509(2), the State appears to assert the court had the authority to order a new sexual offender evaluation upon revocation but before sentencing. Tirey rejects any qualification of its concession.

The subsection relied upon by the State provides that prior to sentencing a person convicted of a sexual offense, the department (DOC) or a sexual offender evaluator shall provide the court with a sexual offender evaluation report recommending a tier level designation. Mont. Code Ann. § 46-23-509(2). Tirey was sentenced in 1997. (Appellant's Br. at Ex. A.) The court was provided with a sexual offender evaluation report before Tirey was sentenced. The court did not designate a tier level designation, placing Tirey's tier level designation under the jurisdiction of the DOC. Mont. Code Ann. § 46-23-509(5).

The statute cited by the State cannot be construed as a grant of power allowing the court to order a sexual offender evaluation at any time other when an individual is being sentenced for a sexual crime.

IV. THE DISTRICT COURT FAILED TO PROVIDE SUFFICIENT REASONS FOR DISALLOWING STREET TIME CREDIT.

The State seeks to add the hearing transcript to the oral pronouncement and written judgment to provide the required statement of reasons for denying credit for street time. (Appellee's Br. at 40.) Even if the State's argument is credited, it fails. The reasons advanced by the State for denying credit for street time are based on APO Fairbank's unreliable testimony.

APO Fairbank misinformed the court that Tirey was a moderate or high risk to reoffend instead of testifying accurately that he was a low risk to reoffend. APO Fairbank failed to provide the court with Exhibit F, thereby misinforming the court Tirey was required to "attend" instead of "enroll" in aftercare within two weeks. Significantly, APO Fairbank arrested Tirey when he attended his first aftercare session. APO Fairbank's failures and omissions misinformed the court and inserted reversible error into the alleged reasons for not crediting street time.

CONCLUSION

Based upon the State's concession, this matter must be remanded for correction and expungment of the unlawful designation of Tirey as a Level II offender. The unlawful Level II designation must expunged with a directive it is not to be used in any manner in the future.

For the reasons stated above, this matter must be remanded for a new revocation hearing with the court being fully and fairly informed before it determines whether Tirey's conduct was what he promised it would be if given liberty. Any alleged violations must be considered in the context of the inhumane homelessness imposed upon Tirey by APO Fairbank, and her withholding of Exhibit F from the court.

This Court should reject the State's request to overturn its well-settled and well-reasoned jurisprudence and determine that the Mont. Code Ann. § 46-18-203 (1995) applies to any revocation of Tirey's suspended sentence.

Respectfully submitted this ____ day of August, 2010.

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CERTIFICATE OF COMPLIANCE

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EILEEN A. LARKIN